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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA

10 THEODORE MATTHEW MORRIS III,) Civil No. 08cv2106 JAH(WMc)
11 Petitioner,)
12 v.) **ORDER ADOPTING THE**
13 MICHAEL SMELOSKY, Warden,) **MAGISTRATE JUDGE'S REPORT**
14 Respondent.) **AND RECOMMENDATION [DOC.**
) **# 12] AND GRANTING**
) **RESPONDENT'S MOTION TO**
) **DISMISS PETITION AS**
) **UNTIMELY [DOC. # 9]**

15 **INTRODUCTION**

16 Petitioner, a state prisoner proceeding *pro se*, filed a petition for writ of habeas
17 corpus pursuant to 28 U.S.C. § 2254. Respondent filed, in lieu of an answer, a motion
18 to dismiss the petition as untimely. Pursuant to 28 U.S.C. § 636(b)(1), the Honorable
19 William McCurine, Jr, United States Magistrate Judge, submitted a report and
20 recommendation ("report") to this Court recommending that respondent's motion be
21 granted and the instant petition be dismissed as untimely filed. Objections to the report
22 were due by July 21, 2009, but neither party filed objections. After a careful consideration
23 of the pleadings and relevant exhibits submitted by the parties, and for the reasons set
24 forth below, this Court **ADOPTS** the magistrate judge's report in its entirety, **GRANTS**
25 respondent's motion to dismiss, and **DISMISSES** the instant petition as untimely.

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BACKGROUND

On May 2, 2005, petitioner plead guilty to one count of gross vehicular manslaughter in violation of California Penal Code § 191.5 and one count of hit and run with injury in violation of California Vehicle Code § 2001(a). On June 14, 2005, petitioner was sentenced to fifteen years to life for the gross vehicular manslaughter charge and eight months for the hit and run with injury charge. Petitioner filed a writ of error *coram nobis* before the California Superior Court on September 6, 2006, which was denied on November 3, 2006. Petitioner subsequently appealed that decision to the California Court of Appeal, which was denied on June 7, 2007. On February 6, 2008, petitioner filed a writ of habeas corpus before the California Supreme Court, which was denied on July 16, 2008.

The instant petition was filed on October 8, 2008. Respondent's motion to dismiss was filed on February 13, 2009. Petitioner filed an opposition to the motion on April 1, 2009. The magistrate judge's report was filed on June 30, 2009. No objections to the report were filed by either party within the time frame allotted for filing such objections.

DISCUSSION

I. Legal Standard

The district court's role in reviewing a Magistrate Judge's report and recommendation is set forth in 28 U.S.C. § 636(b)(1). Under this statute, the district court "shall make a *de novo* determination of those portions of the report . . . to which objection is made," and "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate [judge]." *Id.* When no objections are filed, the Court may assume the correctness of the magistrate judge's findings of fact and decide the motion on the applicable law. Campbell v. United States Dist. Court, 501 F.2d 196, 206 (9th Cir. 1974); Johnson v. Nelson, 142 F. Supp. 2d 1215, 1217 (S.D. Cal. 2001). Under such circumstances, the Ninth Circuit has held that "a failure to file objections only relieves the trial court of its burden to give *de novo* review to factual findings; conclusions of law must still be reviewed *de novo*." Barilla v. Ervin, 886 F.2d 1514, 1518 (9th Cir.

1 1989) (citing Britt v. Simi Valley Unified Sch. Dist., 708 F.2d 452, 454 (9th Cir. 1983)).

2 **2. Analysis**

3 The Court received no objections to the report and no request for an extension of
4 time in which to file any objections. As such, the Court assumes the correctness of the
5 magistrate judge's factual findings and adopts them in full. The Court has conducted a
6 *de novo* review, independently reviewing the report and all relevant papers submitted by
7 both parties, and finds that the report provides a cogent analysis of the issues presented
8 in the motion to dismiss. Specifically, this Court agrees with the magistrate judge that
9 the instant petition was not filed within the one-year statute of limitations period set forth
10 in 28 U.S.C. § 2254(d). This Court further agrees that petitioner is not entitled to either
11 statutory or equitable tolling of the statute of limitations. Statutory tolling is not
12 applicable under the circumstances here because the record reflects petitioner's first state
13 petition was not filed until after the close of the one-year limitations period. As to
14 petitioner's equitable tolling argument, that his trial counsel negligently failed to produce
15 his case files in a timely manner, this Court agrees with the magistrate judge that trial
16 counsel's actions as alleged by petitioner were not so "egregious and atypical" such that
17 equitable tolling should be applied. *See Miranda v. Castro*, 292 F.3d 1063 (9th Cir.
18 2002); *Frye v. Hickman*, 273 F.3d 1144 (9th Cir. 2001). In addition, this Court agrees
19 with the magistrate judge that petitioner failed to demonstrate he exercised due diligence
20 in filing his request for post-conviction relief. Therefore, this Court adopts the magistrate
21 judge's findings and conclusions contained in the report in their entirety.

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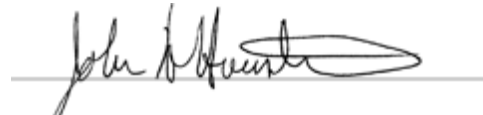
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CONCLUSION AND ORDER

For the reasons set forth above, **IT IS HEREBY ORDERED** that:

1. The findings and conclusions of the magistrate judge presented in the Report and Recommendation [doc. # 12] are **ADOPTED** in their entirety;
2. Respondent's motion to dismiss the instant petition [doc. # 9] is **GRANTED**; and
3. The instant petition is **DISMISSED with prejudice** as untimely filed.

DATED: September 22, 2009


JOHN A. HOUSTON
United States District Judge